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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(SAN FRANCISCO DIVISION)

IN RE: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION	Case No. 07-5944 SC MDL No. 1917
This Document Relates to: *Best Buy Co., Inc., et al. v. Hitachi, Ltd., et al.*, Case No. 3:11-cv-05513 *Best Buy Co., Inc., et al. v. Technicolor SA, et al.*, Case No. 13-cv-05264 *CompuCom Systems, Inc. v. Hitachi, Ltd., et al.*, Case No. 3:11-cv-06396 *Costco Wholesale Corp. v. Hitachi, Ltd., et al.*, Case No. 3:11-cv-06397	**DEFENDANTS' JOINT NOTICE OF MOTION AND MOTION TO EXCLUDE CERTAIN EXPERT TESTIMONY OF PROFESSOR KENNETH ELZINGA** Oral Argument Requested Date: February 20, 2015 Time: 10:00 a.m. Judge: Hon. Samuel Conti

Dell Inc., et al. v. Hitachi, Ltd., et al., Case No. 13-cv-02171

Electrograph Systems, Inc., et al. v. Hitachi, Ltd., et al., Case No. 3:11-cv-01656

Electrograph Systems, Inc., et al. v. Technicolor SA, et al., Case No. 3:13-cv-05724

Interbond Corp. of America v. Hitachi, Ltd., et al., Case No. 3:11-cv-06275

Interbond Corp. of America v. Technicolor SA, et al., Case No. 3:13-cv-05727

Office Depot, Inc. v. Hitachi, Ltd., et al., Case No. 3:11-cv-06276

Office Depot, Inc. v. Technicolor SA, et al., Case No. 3:13-cv-05726

P.C. Richard & Son Long Island Corp., et al. v. Hitachi, Ltd., et al., Case No. 3:12-cv-02648

P.C. Richard & Son Long Island Corp., et al. v. Technicolor SA, et al., Case No. 3:13-cv-05725

Sears, Roebuck & Co. and Kmart Corp. v. Chunghwa Picture Tubes, Ltd., et al., Case No. 3:11-cv-05514

Tech Data Corp., et al. v. Hitachi, Ltd., et al., Case No. 3:13-cv-00157

Viewsonic Corporation v. Chunghwa Picture Tubes, Ltd., et al., Case No. 3:14-cv-002510

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE ISSUE

Whether Professor Elzinga should be precluded from providing expert testimony in the form of a narrative of facts containing Professor Elzinga's inferences and embedded legal conclusions because such a narrative violates the standards for expert testimony contained in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 583 (1997), and its progeny.

II. INTRODUCTION

In an antitrust case, a qualified economist may opine on the industry conditions that make a specific market more or less susceptible to successful collusion. The economist may also assist the trier of fact as to the economic theory of cartels and how conduct can be assessed under that theory. An economist may not, however, narrate the plaintiffs' evidence of cartel behavior for them. Yet, Professor Kenneth Elzinga, an economic expert for certain DAP plaintiffs, apparently intends to provide just such a narrative. Even more, Professor Elzinga's proposed narrative consists of his own subjective interpretations of ambiguous documents and inferences regarding cartel behavior, including inferences as to the existence of "agreements" to restrain trade. There is no field of science—and certainly not of economics—that allows an expert to sift through the evidence, analyze it, and reach conclusions regarding a defendant's culpability. Professor Elzinga's narrative does not assist the trier of fact and his interpretations are unreliable. This Court, in its role as gatekeeper of expert testimony, should prevent Professor Elzinga from providing his proposed factual narrative.

III. FACTS

Professor Kenneth G. Elzinga is a Professor of Economics at the University of Virginia. Declaration of Lucius B. Lau, dated December 5, 2014 ("Lau Decl."), Ex. A (Expert Report of Professor Kenneth G. Elzinga ("Elzinga Report"), dated April 15, 2014), at 2. [redacted]

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[redacted] As laid out in his initial expert report, Professor Elzinga's proposed testimony has several elements. [redacted] Professor Elzinga provides a narrative of how the alleged cartel operated and his view as to how each Defendant individually participated. [redacted] This motion is directed to the proposed testimony contained in this section of Professor Elzinga's report and a parallel section of his reply expert report (described below). In making this Motion, Defendants do not concede the complete admissibility of the remainder of Professor Elzinga's proposed testimony at trial. Defendants reserve all rights to challenge the admissibility of Professor Elzinga's testimony on other, evidentiary grounds at trial.

[redacted]

Professor Elzinga provides a similar narrative in his reply expert report. *See* Lau Decl. Ex. B (Reply Expert Report of Professor Kenneth Elzinga ("Reply Report"), dated

September 26, 2014). [redacted]

[redacted] *Id.* at 37. Professor Elzinga does not analyze the documents through the lens of an economist applying cartel theory, nor does he purport to. Instead, he merely recites and narrates the documents in an apparent attempt to bolster Plaintiffs' factual presentation. *Id.* at 37-62.

Professor Elzinga's narratives improperly are riddled with the language of the law, subjective inferences, and his own characterizations of Defendants' non-economic motive and intent. Among the improper inferences are those that usurp the role of the fact-finder. Professor Elzinga for example infers the formation or existence of "agreements" among Defendants. [redacted]

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[redacted]

Professor Elzinga also injects non-economic knowledge, motive and intent into the narrative, in many instances drawing inferences about what happened prior to, during, or after the event described in the document:

- [redacted]

[redacted] This "intellectual filter" apparently enables Professor Elzinga to interpret anticompetitive intent from the mere fact that communication occurs in the context of a conversation between competitors. [redacted] It also apparently enables Professor Elzinga to infer the existence of agreements from ambiguous evidence, as evidenced by the following exchange:

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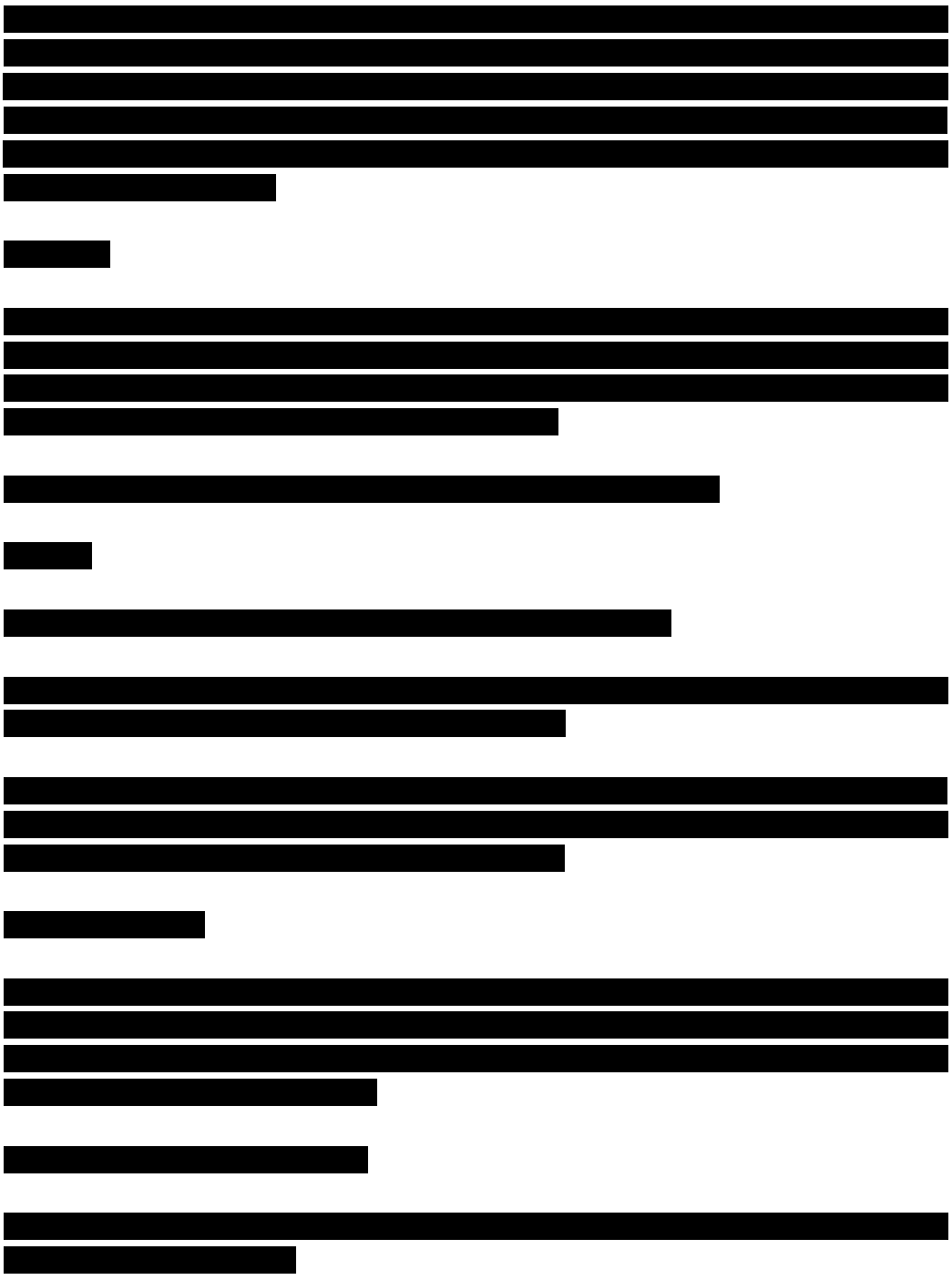

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[redacted]

A juror is perfectly capable of understanding the facts of the case, reaching legal conclusions, and inferring motive and intent. An economist brings no assistance to the trier of fact in that regard. As described below, narratives such as those offered by Professor Elzinga are therefore properly excluded as improper expert testimony. In a conspiracy case, narratives that also offer legal conclusions, inferences, and other non-expert opinion regarding the operation or existence of a cartel lack any scientific basis and are therefore separately inadmissible on that basis.

IV. ARGUMENT

A. The Standard of Review

Rule 702 of the Federal Rules of Evidence provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 702(a) of the Federal Rules of Evidence permits expert testimony by a witness "qualified as an expert by knowledge, skill, experience, training, or education" if "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 n.10 (1993). The proponent of expert testimony has the burden of proving admissibility pursuant to Rule 702 by a preponderance of the

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evidence. *Id.* (citing *Bonriaily v. United States*, 483 U.S. 171, 175-76 (1987)); *United States v. 87-98 Acres of Land More or Less in Ctny. of Merced*, 530 F.3d 899, 904 (9th Cir. 2008).

A district court must act as a gatekeeper to the admissibility of expert testimony. *See Estate of Henry Barabin v. AsterJohnson, Inc.*, 740 F.3d 457, 465-67 (9th Cir. 2014) (*en banc*) (remanding case for new trial because District Court's cursory *Daubert* analysis was an abuse of discretion even if there was no substantive error in the expert testimony heard); *see also Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011) (stating that the district court has a "duty" to act as a gatekeeper to exclude evidence that does not meet Rule 702's reliability standards).

B. Professor Elzinga May Not Argue the Case for Plaintiffs or Usurp the Jury's Role by Presenting Factual Narrative Telling the Jury How to Infer Agreement or Motive

Much of Professor Elzinga's proposed testimony consists of a factual narrative of selected portions of documents and testimony together with Professor Elzinga's personal interpretation and speculation regarding that evidence. Throughout the narrative, Professor Elzinga purports to tell the jury what conclusions to reach from the evidence, including as to whether "agreements" were reached as well as to the knowledge, motive and intent of the individuals described in documents. There are numerous reasons why this kind of narrative and testimony is not proper expert testimony.

1. Factual Narratives Are To Be Presented By Lawyers In Closing Arguments, Not By Expert Witnesses In Testimony

An expert's factual narrative does not assist the trier of fact within the meaning of Rule 702. "While an expert must of course rely on facts or data in formulating an expert opinion, an expert cannot be presented to the jury solely for the purpose of constructing a factual narrative based upon record evidence." *Highland Capital Mgmt. L.P. v. Scheider*, 379 F. Supp. 2d 461, 469 (S.D.N.Y. 2005) (citations omitted); *see also Johns v. Bayer Corp.*, No. 09-CV-1935, 2013 WL 1498965, at *28 (S.D. Cal. April 10, 2013) (citing *Highland*

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Capital and excluding factual narrative). Such narratives inherently address lay matters that a jury can understand without the expert's help. *See Bayer*, 2013 WL 149865, at *28; *Highland Capital*, 379 F. Supp. 2d at 468-69 ("To the extent that [the expert] is simply rehashing otherwise admissible evidence about which he has no personal knowledge such evidence—taken on its own—is inadmissible."). The recitation of facts is the role of the lawyer, at closing argument, not an expert. *Id.*; *Highland Capital*, 379 F. Supp. 2d at 469; *accord United States v. Lukashov*, 694 F.3d 1107, 1116 (9th Cir. 2012) (holding expert testimony that invades the province of the jury should be excluded). The mere fact that an expert adds a special "gloss" or filter to the narrative does not thereby transform the narrative into proper expert testimony. *See in re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 551 (S.D.N.Y. 2004) (holding as inadmissible "the glosses that [the expert] interpolates into his narrative").

Defendants do not dispute that Professor Elzinga may rely upon the documentary record—and even a limited chronology of events—as may be relevant to the application of economic theory to the facts of the case. That exercise, however, is adequately covered in other sections of Professor Elzinga's Expert Report. [redacted] Such a narrative is the proper subject of closing argument, not expert testimony.

2. Professor Elzinga's Narrative Lacks a Reliable Basis

Admissible expert testimony has a reliable basis in the "knowledge and experience of the relevant discipline." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (quoting *Daubert*, 509 U.S. at 592). There is no field of science that allows an expert to sift through the evidence, analyze it, and reach conclusions regarding a defendant's culpability. In antitrust, an "economist has no special skill in reading documents and relating them to actual behavior." George J. Stigler, What Does an Economist Know?, 33 J. Legal Educ. 311, 311

(1983). An economist can assist the trier of fact by explaining the structure of the industry and the alleged conduct from the perspective of cartel theory and economics. *See, e.g.*, *U.S. Info Sys. Inc. v. Int'l Bro. of Elec. Workers Local Union No. 3*, 313 F. Supp. 2d 213, 239-40 (S.D.N.Y. 2004) (distinguishing admissible testimony in which an expert identifies factors that would tend to prove the existence of a conspiracy from inadmissible testimony concluding the existence of a conspiracy); *Ohio v. Louis Trauth Dairy, Inc.*, 925 F. Supp. 1247, 1253-54 (S.D. Ohio 1996) (allowing testimony regarding factors that facilitate collusion); *In re Polyproplyene Carpet Antitrust Litig.*, 93 F. Supp. 2d 1348, 1354-55 (N.D. Ga. 2000) (allowing expert testimony on "climate" of the alleged price-fixed market). It remains for the trier of fact to ultimately draw conclusions of conspiracy from that and other evidence.

In the 2013 *Urethane* case, Professor Elzinga himself decried the practice of inferring conspiracy from the factual record as the work of a "conspiracy-ologist" and not an economist. *See* Lau Decl. Ex. E (Testimony of K. Elzinga, *In re: Urethane Antitrust Litig.*, No. 04-1616 (Dkt # 2871), at Tr. 4521:14-4524:14. Specifically, he explained that:

> As an economist there's nothing in my graduate training, there's nothing in the research I do as an antitrust economist that gives me an advantage or special insight into learning about a conversation that might have taken place when people played golf or when they were at lunch with one another. That type of evidence to me is not economics evidence, it's not what economists work with.

Id. at 4524:2-10. Yet here, in this CRT case, Professor Elzinga engages in exactly the conduct which he previously condemned. He sifts through the evidence, purports to find evidence of each Defendant's participation in the alleged cartel, and draws subjective inferences regarding their individual participation in that alleged conspiracy. Moreover, contrary to his *Urethane* testimony, he seems to claim to have a special training or "intellectual filter" that provides him with special insight into conversations among competitors for this purpose.

[redacted]

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[redacted] In the 2013 *Urethane* trial Professor Elzinga decried the making of non-economic inferences as "conspiracy-ology." Lau Decl. Ex. E at 4521:14-4524:15. [redacted]

Whatever name they are given, Professor Elzinga's conclusions and inferences regarding the existence of a conspiracy have no basis in the field of economics and no basis to be offered in this case.

3. Professor Elzinga's Narrative Includes Embedded Conclusions He Is Not Qualified to Make

Professor Elzinga's narrative is separately inadmissible because of its content. [redacted] It goes without saying that Professor Elzinga lacks any personal knowledge or expertise either of the conduct as alleged, as documented, or of the litigation discovery process. His opinion on what should exist is speculative and inadmissible. *See Tietsworth v. Sears, Roebuck & Co.*, 5:09-cv-00288, 2012 WL 1595112, at *4, *8 (N.D. Cal. May 4, 2012) (excluding speculative expert testimony that complaints regarding washing machine repair were likely under-reported). Separately, Professor Elzinga's narrative contains embedded legal conclusions and inferred motive both of which are well-recognized as inappropriate for expert testimony.

a. Professor Elzinga Has Not Basis to Infer "Agreements"

Expert evidence is not inadmissible merely because it embraces an ultimate issue to be decided by the trier of fact. FRE 704(a). However, when an economist draws inferences

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from the record and presents them "in legal rather than economic terms," the testimony must be excluded. *See Mid-State Fertilizer Co. v. Exch. Nat'l Bank of Chicago*, 877 F.2d 1333, 1340 (7th Cir. 1989). Expert testimony simply cannot be used to provide legal meaning or interpretation. *See McHugh v. United Serv. Auto Ass'n*, 164 F.3d 451, 454 (9th Cir. 1999) (refusing to consider validity of expert testimony and inferences regarding the meaning of a contract); *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir.1992) (stating that expert testimony is not proper for issues of law because the role of experts is to interpret and analyze factual evidence and not to testify about the law); *Aguilar v. Int'l Longshoremen's Union Local No. 10*, 966 F.2d 443, 447 (9th Cir.1992) (same). Here, the existence of "agreements" does not just "touch upon" or "embrace" a legal conclusion. Whether Defendants formed agreements in restraint of trade is *the* first legal conclusion the jury will be asked to determine. *See* American Bar Association, Model Jury Instructions in Civil Antitrust Cases, B-20 (2005) ("To prevail against a Defendant on a price-fixing claim, the Plaintiffs must prove as to that particular Defendant each of the following elements by a preponderance of the evidence: First, that an agreement to fix the price of [] existed . . . .").

To the extent there did exist an expert who could properly testify as to the existence of "agreements," it would not be an economist such as Professor Elzinga. The field of economics contains no concept of "agreement." In other words: "the discipline of economics ha[s] no competence to determine whether parallel behavior among independent actors amount[s] to a legal 'agreement'" principally because "economists typically don't care whether firms have 'agreed' in the legal sense of the term." Herbert Hovenkamp, *Economic Experts in Antitrust Cases*, *in* Modern Scientific Evidence § 38-2.0, at 179 (David L. Faigman et al. eds, 1999); *see also id.* § 38-3.3, at 193 (noting that fact inferences of agreement by an economist are unwarranted). Courts agree that, although an economist may offer opinions about economic conditions and incentives regarding conspiracy, an economist may not appropriately offer the conclusion that an illegal conspiracy or agreement actually existed. *See, e.g., U.S. Info Sys.*, 313 F. Supp. 2d at 239-40 (S.D.N.Y. 2004) (citing cases);

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Holiday Wholesale Grocery Co. v. Philip Morris, Inc., 231 F. Supp. 2d 1253, 1322 (W.D. Ga. 2002) (excluding testimony describing the existence of a "loose cartel").

Professor Elzinga notably does not purport to apply any scientific methodology to his determinations of "agreement." The only validity to Professor Elzinga's "intellectual filter" and his interpretation of evidence is the *ipse dixit* validity that Professor Elzinga himself attributes to this aspect of his work. Although the focus of the *Daubert* inquiry is "on [the] principles and methodology, not on the conclusions that they generate," *Daubert*, 509 U.S. at 595, it is equally true that "conclusions and methodology are not entirely distinct from one another," *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). "[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Joiner*, 522 U.S. at 146 (citations omitted). As such, "bald assurances of validity" of the type Professor Elzinga attaches to his intellectual filter simply do not suffice for *Daubert*. *See United States v. Saya*, 961 F. Supp. 1395, 1397 (D. Haw. 1996) (quoting *Daubert v. Merrell Dow Pharm.* 43 F.3d 1311, 1315 (9th Cir. 1995)); *see also Mesfun v. Hagos*, No. 03-2182, 2005 WL 5956612, at *11 (C.D. Cal. Feb. 16, 2005) (holding inadmissible expert testimony that is "nothing more than personal opinions and assumptions regarding the facts of the case").

That Professor Elzinga may disclaim offering a legal definition of "agreement" is of no moment. "Even if a jury were not misled into adopting outright a legal conclusion proffered by an expert witness, the testimony would remain objectionable by communicating a legal standard–explicit or implicit–to the jury . . . ." *Hygh v. Jacobs*, 961 F.2d 359, 363 (2d Cir. 1992). The risk that a jury, confronted with a credentialed expert, would be confused or give undue deference to the expert's implicit characterization of the evidence is simply too great. *Id.*; *see, e.g., United States v. Saya*, 961 F. Supp. 1395, 1397 (D. Haw. 1996); *U.S. Info. Sys.*, 313 F. Supp. 2d at 239-241 (holding that an expert's use of "embedded legal conclusions" in a fact narrative is inadmissible).

b. No Expert May Properly Opine on A Defendant's Motive and Intent

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An expert may not offer opinions regarding a defendant's intent, motive or state of mind. *See S.E.C. v. Life Wealth Mgmt., Inc.*, No. 10-4769, 2013 WL 1660860, at 8* (C.D. Cal. Apr. 17, 2013) (holding "it is improper for [an expert] to assert conclusions about [the defendants'] motive, intent or state of mind"); *Highland Capital*, 379 F. Supp. 2d at 469 (excluding expert testimony regarding state of mind and motivations as "consist[ing] simply of inferences that [the expert] draws from other evidence in the case"). "Expert testimony is not relevant if the expert is offering a personal evaluation of the testimony and credibility of others or of the motivations of the parties." *U.S. Info. Sys.*, 313 F. Supp. 2d at 226. Professor Elzinga does not and could not know what was "clear," "recognized," or otherwise known to Defendants. His proposed testimony however is replete with these characterizations. Professor Elzinga's speculations about knowledge, motive and intent are simply inadmissible.

C. Cross-Examination Is Not a Sufficient Remedy

Any suggestion that cross-examination is a sufficient antidote for this prejudicial testimony would be mistaken. Cross-examination is an inadequate remedy where, as here, the proposed testimony is prejudicial and/or unreliable at its core. *See, e.g.*, *United States v. Hebshie*, 754 F. Supp. 2d 89, 113 (D. Mass 2010) ("Cross-examination suffices only when experts have reached different conclusions, but the underlying approach is sound. Where it is not, exclusion, or in some situations, limitation, is the only option."); *Reed v. City of Chi.*, No. 01-C-7865, 2006 WL 1543928, at *3 (N.D. Ill. June 1, 2006) ("while it is true that '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence,' such safeguards are not a basis for admitting otherwise inadmissible evidence") (quoting *Daubert*, 509 U.S. at 596).

V. CONCLUSION

For these reasons, the Court should grant Defendants' Motion and preclude Professor Elzinga from presenting a narrative at trial, inferences about the existence of "agreements," and inferences about Defendants' motive and intent.

Respectfully submitted,

Dated: December 5, 2014

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(With respect to all of the above-captioned cases except for *Dell Inc., et al. v. Hitachi, Ltd., et al.*, No. 13-cv-0271)

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CERTIFICATE OF SERVICE

On December 5, 2014, I caused a copy of the Defendants' Joint Notice of Motion and Motion to Exclude Certain Expert Testimony of Professor Kenneth Elzinga to be electronically filed via the Court's Electronic Case Filing System, which constitutes service in this action pursuant to the Court's order of September 29, 2008.

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